Filed 6/9/15 In re F.C. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re F.C. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. A.C., Defendant and Appellant.	G051056 (Super. Ct. Nos. DP020053, DP020054) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Craig E. Arthur, Judge. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsels for Plaintiff and Respondent.

Mother appeals from an order terminating her parental rights. She was not personally given notice that, 12 days prior to the hearing, Orange County Social Services Agency (SSA) changed its recommendation from guardianship, in which mother's parental rights would not be terminated, to adoption, in which her rights would be terminated. Her counsel was given notice. Mother contends she was entitled to personal notice under these circumstances. Mother also contends the court erred by failing to grant a continuance where mother's counsel had been unable to reach mother for three weeks prior to the Welfare and Institutions Code section 366.26 hearing (.26 hearing).[1]

We affirm. Assuming mother was entitled to personal notice of SSA's changed recommendation, the error was forfeited and it was harmless.

Mother's counsel did not object to the lack of notice in the trial court, and in fact she indicated her belief that mother did have notice of the changed recommendation. On appeal, mother contends her counsel was mistaken in that belief and was ineffective in failing to object, but that argument requires evidence of what transpired between her and her attorney, which we do not have in the record before us.

With regard to prejudice, mother contends that, had she been notified, she could have prevailed under the child-benefit exception (§ 366.26, subd. (c)(1)(B)(i)), which permits the court to decline adoption where the parent has maintained consistent visitation and the continued relationship would be of benefit to the child. But mother's counsel was notified with time to prepare a defense. She offered no argument on that point at all. That was apparently because mother had not returned counsel's phone calls. The consequences of mother failing to make herself available to her attorney fall squarely on her. Her failure to make the child-benefit argument was due to her not being available, not due to lack of notice.

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[1] All statutory references are to the Welfare and Institutions Code.

With regard to the continuance, the court did not abuse its discretion. Mother received notice of the hearing and thus knew when it was to take place. She called her attorney at least three weeks beforehand and expressed some concerns. Three weeks was plenty of time to make additional contact with her attorney, but she did not return her counsel's phone calls and otherwise failed to contact her attorney again. Her failure to do so did not require the court to grant a continuance. Accordingly, we affirm.

FACTS

In July 2010, SSA made contact with the father of the children at issue, M.C., F.C., and A.D. The children lived at father's home and SSA determined the home was in an unsafe and unsanitary condition. "There was minimal food in the home, cockroaches and flies, dirty diapers on the floor, excessive amounts of trash on the floor with no trash cans in the home, empty beer cans and empty Vodka bottles in the living room and kitchen and dirty dishes. The children's mother [had] been living in Mexico for the past two years." "[A]t the time [SSA] and law enforcement made contact with the father and children, the children's father was passed out and was difficult to awaken. The children's father and mother have criminal records which include drug and alcohol related arrests." Father reported he was still married to mother. Mother had been deported, and her whereabouts in Mexico were unknown. Father had been caring for the children without mother's help for three to four years. SSA filed a petition that the court granted, maintaining placement with father, but ordering father to keep the home clean, submit to random urine testing, and not to consume alcohol. The court also found father to be the presumed father.

In September 2010 father pleaded no contest to the petition at a combined adjudication/disposition hearing. The court declared the children dependents, kept custody vested with father, and ordered parenting classes and drug testing.

In June 2011, the court issued a protective custody warrant to remove the children from the home. In support of the application for the warrant, the social worker declared that father had difficulty remaining alcohol free and compliant with the case plan. According to a neighbor, father was a "constant drunkard," was inconsistent in feeding the children, the children frequently missed school, and they had no clean school uniforms. A few days later the court granted a supplemental petition to detain the children. Shortly thereafter, they were placed with their paternal aunt.

In July 2011, a social worker managed to contact mother in Mexico. Mother provided contact information and an attorney was appointed for her.

In August 2011, the court held a combined adjudication/disposition hearing on the supplemental petition. Because mother had been deported and was not permitted back in the country, she was unable to attend the hearing. The court found the allegations of the petition to be true and ordered that the children continue in the custody of SSA. The court ordered monthly visits between mother and the children at a border facility in San Ysidro.

Prior to the six month review hearing, the social worker reported that the children were comfortable, well-adjusted, and living with their paternal aunt and uncle. Mother continued to live in Mexico but remained in phone contact with the children and attended the monthly visits with her children. The court continued placement and family reunification services and set a 12-month review hearing.

Prior to the 12-month review hearing, the social worker reported "[t]he children continue to thrive while in the placement of the paternal aunt." Also, visits between mother and children were going well. Mother was maintaining consistent phone contact. The social worker expressed some concern, however, that mother was asking children to bring her money and used clothes, and mother ultimately agreed not to do so. Mother had completed counseling services, but had not been able to drug test because she could not afford the tests. The social services agency in Mexico prepared a socio-

economic report as to mother and concluded that mother was perceived to be stable, hard working, responsible, and had suitable housing for the children.

At the 12-month review hearing, held in October 2012, the court continued family reunification services and set an 18-month review hearing.

By February, the paternal aunt had expressed the view that she could not care for the children long term. Accordingly, SSA began investigating two alternatives: place the children with their adult brother, or reunify the children with their mother in Mexico. The children expressed a preference to stay in the United States and thus be placed with their adult brother. The brother agreed to have his siblings placed with him and his wife.

In March, however, the paternal aunt changed her mind and agreed that it would be best for her to become the legal guardian. The children were in the middle of a school semester and did not want to change schools, and the father was at this point homeless and living on the street. She agreed, at minimum, to let the children live with her until the end of the school year.

At a hearing later in March, the court terminated reunification services and set a .26 hearing. The court found that the "permanent plan of legal guardianship with a specific goal of dismissal of dependency is appropriate and is ordered as the permanent plan." The court also ordered funding for mother to begin drug testing. And it ordered that notice be given to the parents that their parental rights could be terminated at the .26 hearing. Notice was given to the mother 11 days later.

In July, the paternal aunt stated that she could no longer bear the financial burden of keeping the children. And the adult brother had been unable to provide suitable housing. Accordingly, the children were placed with a non-relative foster parent.

SSA produced a report for the .26 hearing in which the social worker opined that termination of parental rights would be detrimental to all three children. SSA recommended long-term foster care.

By late July, the new foster mother gave notice to remove F.C. from the home due to inappropriate behavior. M.C. expressed a desire to stay with the foster mother, even if it meant separation from her brothers.

At the .26 hearing in late July 2013, the court found that termination of parental rights and adoption were not in the best interests of the child. The court ordered independent living with identification of a caring adult for M.C. (who was at least 16 years of age), and placement with a less restrictive foster setting for the other two children.

In early August 2013, the paternal aunt expressed regret at having given up the children and requested that they be placed with her and that she be appointed their legal guardian. All three children were placed back with the paternal aunt in late August.

Beginning in July 2013, mother disappeared. She stopped visits and phone contact. For reasons unclear in the record, a "good-bye visit" was scheduled in August 2013, but mother did not show up. Mother resumed sporadic telephone contact with the children around January 2014. The children reportedly were "happy to have some contact with the mother and expressed they are hopeful they can have visits with their mother in the future." Mother resumed visits in August 2014. Thus she missed an entire year of visits.

Prior to a review hearing in July 2014, SSA reported that the paternal aunt had "been meeting the children's needs and is providing the children a stable, secure, and nurturing home environment." The paternal aunt indicated a desire to become the children's legal guardian. At the review hearing, the court found that the permanent plan of long-term foster care was no longer appropriate and scheduled another .26 hearing for November 2014. At the review hearing, the court stated, "It's anticipated that the current caretaker, relative caretaker, will assume legal guardianship."

SSA sent notice of the .26 hearing to mother in July 2014. The notice stated, in bold, "At the hearing the court may terminate parental rights and free the child

for adoption . . . ." It also stated that the social worker recommended the establishment of a legal guardianship. In August 2014, SSA sent an identical notice of the .26 hearing to mother, except in Spanish.

In September 2014 SSA reported that the children felt the visits with their mother were awkward and "strange," though they expressed a desire to keep meeting with her monthly. It was also recently discovered that father had died during surgery related to liver failure.

On October 31, 2014, SSA filed a report changing its recommendation from legal guardianship to adoption and termination of parental rights. SSA reported that, while the paternal aunt had previously been interested in legal guardianship, "just recently, they have stated that they have decided to pursue adoption of both children and not Legal Guardianship."[2] Regarding the mother, it appears that she continued visiting the children once per month and maintained at least twice monthly telephone contact, though the telephone contact was reportedly brief. The children reported they did not call more because they were too busy. The paternal aunt indicated she encourages the children to call their mother more, but they choose not to. F.C. stated that he wanted to be adopted by the paternal aunt, though he also wanted to continue visitation with his mother. A.D. "expressed his desire to be adopted by his current caregiver, his paternal aunt." The social worker opined, "The undersigned believes that terminating parental rights would not be detrimental, as the children have not had consistent and meaningful contact with their mother. Moreover, the children themselves have expressed their desire to continue to reside with their relative caregivers under a plan of adoption."

There is no indication in the record that notice was given to mother of the change in recommendation. Mother's counsel, however, was given notice.

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[2] M.C., by this time, was nearly 18 years old and thus the .26 hearing concerned only F.C. and A.D.

At the .26 hearing on November 12, 2014, mother's counsel sought a continuance of the hearing. She explained: "The mother called my office on September 22nd and left a message in Spanish that I could understand indicating that she had received the report and wanted to know what was going on. [¶] I'm assuming that was her first notice that the aunt was planning on adopting the children. She had previously been in agreement with the aunt taking legal guardianship, but that permanent plan changed then to adoption." Counsel went on to explain, "I did try to call her back. As the report indicates, the mother often times does not answer her phone. She works a lot of hours, she can't use her phone, it has to be in a locker while she's at work, so I've been unable to contact her. [¶] This morning the social worker called for me to that number and indicated that the number is no longer in service and the phone is not working at this time." She sought a continuance of "several weeks" in order to confer with mother via letter. The court denied the request for a continuance, finding no good cause, and finding it would not be in the children's best interests. The court went on to find that mother had received proper notice, terminated her parental rights, and ordered that the children be placed for adoption. Mother timely appealed.

DISCUSSION

Mother contends we should reverse because she was not given personal notice of the change in SSA's recommendation from legal guardianship to adoption.

Section 294 sets forth the general notice requirements for a .26 hearing. It specifies that the mother is entitled to notice. (§ 294, subd. (a)(1).) "Service of the notice shall be completed at least 45 days before the hearing date." (*Id*., subd. (c)(1).) "The notice shall contain the following information: [¶] (1) The date, time, and place of the hearing. [¶] (2) The right to appear. [¶] (3) The parents' right to counsel. [¶] (4) The nature of the proceedings. [¶] (5) The recommendation of the supervising agency. [¶]

(6) A statement that, at the time of hearing, the court is required to select a permanent plan of adoption, legal guardianship, or long-term foster care for the child." (*Id*., subd. (e)(1)-(6).) Subdivision (d), on which mother bases her argument, provides for the following notice where the .26 hearing is continued: "Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, or to any person entitled to receive notice pursuant to this section, subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address, by an order made pursuant to Section 296, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing. *However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent, and to any person entitled to receive notice pursuant to this section, regarding that subsequent hearing*." (§ 294, subd. (d), italics added.)

Mother contends that under subdivision (d) of section 294, she was entitled to notice of the changed recommendation. That subdivision, however, requires notice of a changed recommendation only if the .26 hearing is continued, which was not the case here.

Nonetheless we agree that mother would be entitled to notice under due process principles. "[P]arents are entitled to due process notice of juvenile proceedings affecting their interest in custody of their children. [Citation.] And due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) Here, mother's counsel was notified, but mother was not notified.

Assuming, without deciding, that due process required notice directly to mother and not merely to her counsel, we conclude the error has been forfeited on appeal.

Mother's counsel did not object to the lack of notice. On the contrary, mother's counsel's understanding was that mother had actual notice based on the phone message she had received from mother. Ordinarily, this would forfeit the error. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1209.) Mother contends we should nonetheless consider the issue because failure to object to the lack of notice of the changed recommendation was ineffective assistance of counsel.

We acknowledge that there is an inconsistency concerning counsel's statement on the record. Counsel said she received the phone call from mother on September 22, which she claimed was mother's first notice of the proposed adoption, but that was over a month before SSA filed a report changing its recommendation. However, we do not know the cause of the inconsistency. Did counsel simply misspeak and mean to say she received the voicemail message on *October* 22, in which case mother may have received informal notice? Or did counsel simply misunderstand mother's statements in the voicemail message?

On this record, we do not know. What we do know is that counsel was under the impression that mother already had notice of the changed recommendation. And if that was correct, no objection was required. For that reason, to the extent mother wishes to pursue this claim, she should do so in the context of a petition for writ of habeas corpus, where she can present evidence of what actually happened. Since mother cannot establish ineffective assistance of counsel on this record, the error was forfeited for purposes of this appeal.

We also conclude the error, if any, was harmless. Mother contends we should not consider whether the error was prejudicial because the failure to give notice is "structural" error which requires automatic reversal. She cites *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116 for the proposition, "the failure to attempt to give a parent statutorily required notice of a selection and implementation hearing is a structural defect that requires automatic reversal" Mother asks that we apply the same principle here.

However, our high court more recently cautioned against using a structural error analysis in the context of a dependency proceeding. (*In re James F.* (2008) 42 Cal.4th 901 (*James F.*).) *James F.* reviewed a decision of the Court of Appeal holding there was structural error where the trial court failed to explain to a mentally incompetent father the need for, and effect of, appointing a guardian ad litem in a juvenile dependency proceeding. (*Id.* at pp. 904-905, 911, 916-917.) Reversing, our Supreme Court concluded "that error in the procedure used to appoint a guardian ad litem for a parent in a dependency proceeding is trial error that is amenable to harmless error analysis rather than a structural defect requiring reversal of the juvenile court's orders without regard to prejudice." (*Id.* at p. 915.)

In reaching that conclusion, the *James F.* court explained, "The United States Supreme Court has not applied this reasoning [structural error] outside the context of criminal proceedings, . . . nor has it ever held that harmlessness is irrelevant when the right of procedural due process — the constitutional right on which [father] here relies — has been violated." (*James F., supra,* 42 Cal.4th at p. 917.) The court observed "that juvenile dependency proceedings differ from criminal proceedings in ways that affect the determination of whether an error requires automatic reversal of the resulting judgment." (*Id.* at p. 915.) It noted that evidentiary rules are more relaxed, certain constitutional rights given to a criminal defendant are not afforded to a parent, there is no right to a jury trial, and the standard of proof is lower. (*Ibid.*) "Finally, the ultimate consideration in a dependency proceeding is the welfare of the child [citations], a factor having no clear analogy in a criminal proceeding." (*Ibid.*) The court concluded, "We cannot agree with the Court of Appeal majority that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child." (*Id.* at p. 917.) "If the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and

reversal is not required." (*Id.* at p. 918.) We conclude that *James F.* requires us to assess the prejudicial effect of the error.

Mother claims that, but for the lack of notice, she may have been able to prevail on the child-benefit exception if she had been given notice. Under section 366.26, subdivision (c)(1), if the court finds the child is adoptable it must terminate parental rights unless "(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Here, mother's counsel (and perhaps mother herself) had notice of the change in recommendation 12 days prior to the hearing. Yet when the court asked mother's counsel for any argument opposing SSA's recommendation, counsel offered no argument at all. Twelve days was sufficient time to put together an argument under the child-benefit exception. The facts concerning mother's infrequent and inconsistent visitation were easily accessible, and the children could have been called to testify. The apparent reason why counsel offered no argument was that counsel had been unable to get in contact with mother.[3] But, again, that was mother's fault. Accordingly, on the facts before us, we conclude mother's inability to present an argument for the child-benefit exception was due to mother's unavailability, not a lack of notice.

For similar reasons, the court did not abuse its discretion in denying the continuance. Whether mother called her counsel on September or October 22, there was

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[3] Indeed, counsel thought mother may not even object to the adoption, stating, "It's my feeling that once the aunt completes the adoption, that the aunt will facilitate visitation with the mother in Mexico because there are other relatives in Mexico, so it's my belief that this is ultimately going to be in her best interests because she will be able to see her children face-to-face at some point in the future, whereas now she has to visit when the agency sets it up at the border, which isn't a very quality visit for the children."

plenty of time for mother and counsel to confer to prepare an argument for the .26 hearing. Mother's failure to contact her counsel did not require the court to grant a continuance, particularly where mother's counsel requested a continuance of "several weeks," and where there was no guarantee counsel would be able to contact mother at all (recall, during the proceedings mother had previously disappeared for an entire year).

DISPOSITION

The postjudgment order is affirmed.[4]

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.

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[4] SSA filed a motion requesting this court to take additional evidence (to which mother filed an opposition) in an attempt to introduce new evidence to our court in an attempt to prove that SSA had mailed to mother a copy of the October 31, 2014, report recommending adoption. The evidence consists of a declaration from a social worker attaching a business record that has an ambiguous marking the social worker claims indicates the report was mailed to mother. The social worker also declared she called mother two days after the .26 hearing, and mother reported that she had been aware of the adoption recommendation and respected the court's orders. We deny the motion. (See *In re Zeth S.* (2003) 31 Cal.4th 396 ["'Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 . . ., the authority should be exercised sparingly'"].)